Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-348

In The

Supreme Court of the United States

October Term, 1986

ASSIGNED CONTAINER SHIP CLAIMS, INC.,
Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD., SEA-LAND SERVICE, INC., AND UNITED STATES LINES, INC.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

Lasky, Haas, Cohler & Munter P.C.
Charles B. Cohler
Terry M. Gordon
505 Sansome Street
San Francisco, CA 94111
(415) 788-2700

Robert S. Zuckerman*
Sea-Land Service, Inc.
P. O. Box 800
Iselin, New Jersey 08830
(201) 632-2222

Counsel for Respondent Sea-Land Service, Inc.

Donovan Leisure Newton & Irvine
Sanford M. Litvack*
Vivian Polak
303 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Carr & Mussman
Timothy E. Carr
Lenell Topol
Three Embacardero Center
San Francisco, CA 94111
(415) 391- 7112

Counsel for Respondent United States Lines, Inc.

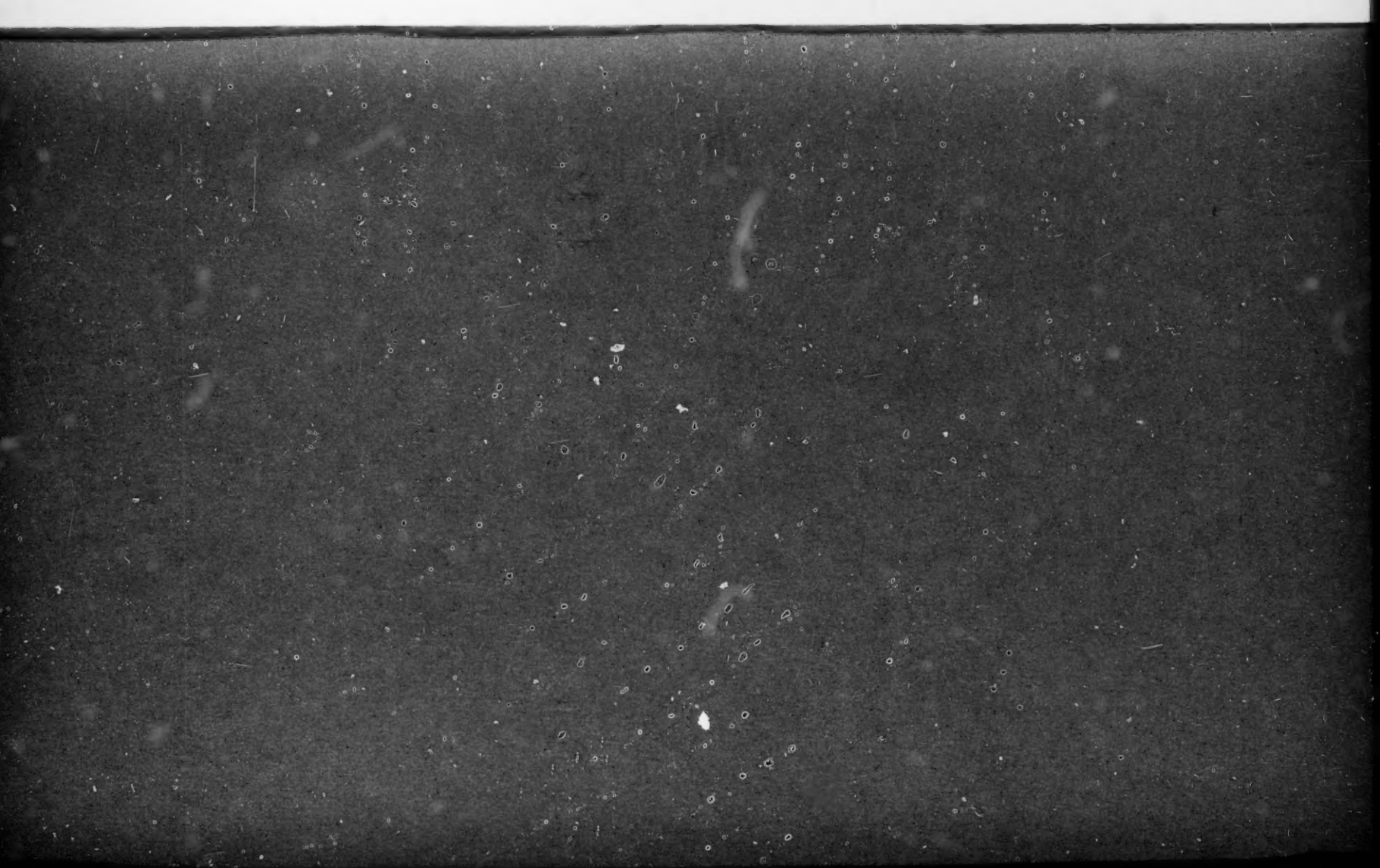
McCutchen, Doyle, Brown & Enersen
J. Thomas Rosch
John N. Hauser*
Brenda G. Woodson
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Counsel for Respondent American President Lines, Ltd.

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

34pp



QUESTION PRESENTED

Do the "special and important reasons" required for the granting of review on writ of certiorari (Rule 17.1) exist here, where (a) the judgment for respondents was affirmed simply on the ground that there was no substantial evidence to take the petitioning process attacked by petitioner out of the *Noerr-Pennington* doctrine, (b) in fact there was no such substantial evidence and (c) lack of causation furnished an additional and independent basis for the judgment?

RULE 28.1 LISTING

Respondent American President Lines, Ltd. is a wholly-owned subsidiary of American President Companies, Ltd.

Affiliated companies of respondent United States Lines, Inc. are First Colony Farms, Inc. and McLean Industries, Inc.

Respondent Sea-Land Service, Inc., is a wholly-owned subsidiary of Sea-Land Corporation. However, on April 25, 1986, Sea-Land Corporation, CSA Acquisition Corp., and CSX Corporation ("CSX") entered into an Agreement and Plan of Merger providing for the acquisition of Sea-Land Corporation pursuant to a tender offer ("Offer") for all outstanding shares of common stock of Sea-Land Corporation at $28 in cash per share. Pursuant to the Offer, CSX (through CSA Acquisition Corp., a wholly-owned subsidiary which will ultimately be merged with and into Sea-Land Corporation) acquired a total of 15,580,642 shares of Sea-Land Corporation common stock. On July 23, 1986, CSX acquired through the exercise of options (obtained on April 25, 1986) an additional 9,183,831 shares. CSX has acquired an additional 27,900 shares through open market purchases.

All Sea-Land Corporation shares owned or acquired by CSX or any subsidiary of CSX are being or will be held in an interim voting trust with Midlantic National Bank pending Interstate Commerce Commission approval of the acquisition of Sea-Land Corporation.

Non-wholly-owned subsidiaries of respondent Sea-Land Service, Inc. are Arabian Container Terminals Lim-

ited and Sea-Land Container Terminal Administration Co., Ltd. Affiliated companies of respondent Sea-Land Service, Inc. (defined as those companies which are subsidiaries of respondent's parent, Sea-Land Corporation) are Sea-Land Industries USA, Inc.; Sea-Land Industries (Bermuda) Ltd.; Container Freight Systems, Inc.; Interseas Operations Limited; SL Aircraft, Inc.; Sea Readiness, Inc.; Tacoma Terminals, Inc.; and Transportation Systems, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 28.1 LISTING	ii
STATEMENT OF THE CASE	1
A. Proceedings Below	1
B. Statement of Facts	4
1. The Legal Background	4
2. MARAD's Amendment to Lykes' Subsidy Agreement	5
3. Respondents' Petitions	7
4. Lykes' Agreement That 605(c) Notice Be Given	7
5. MARAD's Adoption of the Proposed Amendment	9
6. Lykes Was Not a Potential Bidder for the PFEL Ships	9
REASONS FOR DENYING THE WRIT	12
ARGUMENT	12
I. THE COURT OF APPEALS' APPLICATION OF THE *NOERR-PENNINGTON* DOCTRINE DID NOT CONFLICT WITH *SOCONY-VACUUM*	12
II. THE COURT OF APPEALS' APPLICATION OF THE *NOERR-PENNINGTON* DOCTRINE DID NOT CONFLICT WITH *CARNATION*	14
III. THERE WAS AN ALTERNATIVE GROUND FOR AFFIRMING THE JUDGMENT BELOW	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 15

Delta Steamship Lines, Inc., 22 Shipping Regulations Reporter (P&F) 226 (MSB 1983) 5

Prudential Lines, Inc., 17 Shipping Regulations Reporter (P&F) 1471 (MSB 1977) 5

Sea-Land Service, Inc. v. Connor, 418 F.2d 1142 (D.C. Cir. 1969) 4, 5, 7

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 16

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 12, 14

Waterman Steamship Corp., 13 Shipping Regulations Reporter (P&F) 472 (MSB 1972) 5

STATUTES

Section 605(c) of the Merchant Marine Act, 1936 (46 U.S.C. § 1175(c)) 4, 5, 7-10

Shipping Act of 1916 (46 U.S.C. §§ 801 *et seq.*) 15

RULES OF THE SUPREME COURT

Rule 17.1 ..... 12, 17

No. 86-348

In The

Supreme Court of the United States

October Term, 1986

ASSIGNED CONTAINER SHIP CLAIMS, INC.,
Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD., SEA-LAND SERVICE, INC., AND UNITED STATES LINES, INC.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Proceedings Below.

The nominal plaintiff and petitioner in this case is Assigned Container Ship Claims, Inc. The antitrust claims it made below were purchased from the bankruptcy trustee of Pacific Far East Lines, Inc. ("PFEL"). (I SER. 55, ¶¶ 1, 2)[1] PFEL's trustee did not assert the claims himself

[1] Throughout this brief, "Pet." refers to the Petition for a Writ of Certiorari. "ER," preceded by the appropriate volume number (e.g., I ER), refers to the three-volume Excerpts of Record filed by appellant below; the reference will be followed by CPI's tab number and sometimes by more detailed citations, identifying the name of a witness and/or more detailed citations to pages within the documents appellant has tabbed. "SER," preceded by the appropriate volume number, refers to the two-volume Supplemental Excerpt of Record filed by appellees below, which will be followed by a tab number and sometimes by the more detailed citations described above.

because he was advised by two special antitrust counsel not to do so. (I ER 127, App. A, Int. Resp. 11(m).) But Robert Driscoll ("Driscoll"), petitioner's original attorney of record, purchased the claims for petitioner, a newly-formed corporation of which Driscoll was the sole incorporator, president, chief financial officer, director, and a shareholder. (I ER 127, App. B, Int. Resp. 7, 8, 10; I ER 127, App. C.) Driscoll then filed this lawsuit in petitioner's name.

The claim which Driscoll made in petitioner's original complaint was that respondents had filed petitions with the federal Maritime Administration ("MARAD") to restrict the authority of Lykes Brothers Steamship Company ("Lykes") to conduct subsidized containership operations in the Pacific. (I ER 1, ¶¶ 9-12.) The complaint alleged that respondents' petitioning activity had caused Lykes to refrain from bidding for three PFEL containerships sold at auction in April 1979 with the result that respondent APL allegedly was able to purchase the ships at less than their fair value. (*Id.*)

Shortly after the action was filed, Driscoll met with Lykes' Washington, D.C. counsel, who was also a part of Lykes' management team. Lykes' counsel told Driscoll (1) that the position taken by respondents in their MARAD petitions was one which MARAD itself had "consistently" taken (I SER 157, Kominers Depo. 159-60) and (2) that, in any event, Lykes never had any intention of bidding, nor the ability to bid, on the PFEL ships. (I SER 157, Kominers Depo. 166-167, 174-75). Despite this knowledge,

Driscoll filed a first amended complaint[2] and a second amended complaint repeating the claim that respondents had caused Lykes not to bid for the PFEL ships by filing baseless claims with MARAD. (I ER 34, ¶¶ 9-13; 1 SER 55, ¶¶ 17-24.)

As the case proceeded through discovery, the falsity of petitioner's claim was repeatedly confirmed by other disinterested third-party witnesses. MARAD's General Counsel at the time of the petitioning activity involved here testified that respondents were entitled to the relief sought in their petitions, as a matter of law. (I SER 299, Exh. 2, Caras Depo. 79-81.) Lykes' president testified that, regardless of the petitions, Lykes was financially and operationally unable to, and never intended to, acquire the PFEL ships. (II SER 374, Amoss Depo. 309-14, 327; II ER 129, Amoss Decl. ¶¶ 2-3.) Petitioner's assignor, the PFEL bankruptcy trustee, attested that Lykes' president had told him the same thing both before and after respondents filed their petitions. (I SER 307, Benedict Decl. ¶¶ 13, 20.) But the claim was not voluntarily dismissed, and so respondents had to move for summary judgment.

Summary judgment was granted by the District Court, and the Court of Appeals unanimously affirmed that judgment. It held that the petitioning process attacked by petitioner was covered by the *Noerr-Pennington* doctrine. It therefore did not consider the evidence which established that Lykes did not intend to bid on the PFEL ships in any

---

[2] The original complaint was dismissed for failure to state a claim upon which relief could be granted on the ground that, as pleaded, it was barred by the *Noerr-Pennington* doctrine. (I ER 127, App. D.)

event, which furnished a separate basis for the judgment of dismissal.

In short, this lawsuit was brought by a straw plaintiff. It was prosecuted although the alleged victim told petitioner's assignor and petitioner's attorney that petitioner's critical allegations were false. It was summarily dismissed, and that dismissal was affirmed by a unanimous Court of Appeals. And, as discussed below, the petition to this Court does not present any of the "special and important reasons" which this Court's rules require be presented in a petition for writ of certiorari.

B. Statement of Facts.

1. *The Legal Background.* Section 605(c) of the Merchant Marine Act, 1936 (46 U.S.C. § 1175(c)) prohibits the federal government from subsidizing any ocean carrier service which constitutes an addition to existing U.S. Flag service without giving notice and the opportunity for a prior hearing to "each operator serving such . . . service" as to whether (1) the existing U.S. Flag service is inadequate and (2) the additional service would further the purposes and policies of the Act.

In 1969 the D.C. Circuit had occasion in *Sea-Land Service, Inc. v. Connor,* 418 F.2d 1142 (D.C. Cir. 1969) to interpret Section 605(c) in circumstances squarely relevant to this case. There MARAD had awarded subsidy to a containership service initiated pursuant to an amendment to an application for subsidized conventional breakbulk service. The D.C. Circuit held that the amendment broadened the original application "sufficiently to require notice and

opportunity for hearing to inquire into the need for such service." 418 F.2d at 1147-48.

Following *Connor,* MARAD held that while Section 605(c) did not require notice and hearing in every instance for the replacement of obsolete ships with the same type of ships under a continuing subsidy contract (*Waterman Steamship Corp.,* 13 Shipping Regulations Reporter (P&F) 472 (MSB 1972)), significant changes in type of service—such as substitution of containerships for conventional ships—would require notice and hearing pursuant to Section 605(c). *Delta Steamship Lines, Inc.,* 22 Shipping Regulations Reporter (P&F) 226, 231 (MSB 1983); *Prudential Lines, Inc.,* 17 Shipping Regulations Reporter (P&F) 1471, 1496 (MSB 1977). In 1979, however, MARAD took action which departed from this law and resulted in the petitioning activity which was the subject of this case.

2. *MARAD's Amendment to Lykes' Subsidy Agreement.* In January 1979, respondents American President Lines, Ltd. ("APL"), United States Lines, Inc. ("U.S. Lines") and Sea-Land Service, Inc. ("Sea-Land") were all U.S. Flag carriers, which were providing service by containerships on Pacific Trade Routes 17 and 29 (Pet. 2-3); as such, they were entitled to notice and hearing under Section 605(c). Lykes provided no service at all on Trade Route 29; no West Coast-Pacific Service on Trade Route 17; and no containership service anywhere. (Pet. 3.)

On December 8, 1978, MARAD's Subsidy Board awarded Lykes a renewed long-term operating differential subsidy contract covering Lykes' existing service. (I SER 55, ¶ 8; II SER 374, Amoss Depo., Exh. 7.) Shortly thereafter, Lykes acquired three RO/RO ships—ships from

which cargo can be rolled on and off.[3] (II SER 374, Amoss Depo. 126-28; I SER 55, ¶ 10.) These RO/RO ships previously had been owned and operated by States Steamship Company ("States"), which was authorized to provide up to 95 subsidized sailings on Trade Routes 17 and 29. (I SER 55, ¶ 9; II SER 374, Amoss Depo., Exh. 6.)

On January 2, 1979, MARAD issued a letter to Lykes confirming the renewal of Lykes' long-term differential subsidy contract for twenty years and containing, as "Part M," an Addendum (hereinafter "January 2 Addendum") setting forth certain "understandings" between MARAD and Lykes respecting Lykes' acquisition of States RO/RO ships. (II SER 374, Amoss Depo., Exh. 8, at 9-13). The January 2 Addendum provided, among other things, that for the twenty-year period covered by Lykes' subsidy contract (1) Lykes was authorized to perform subsidized service on Trade Routes 17 and 29 with the three RO/RO ships and up to six conventional ships from the Lykes fleet and, *in addition*, (2) "[i]nterchange (substitution) and transfer privileges" would be granted to all Lykes' vessels between all services. (II SER 374, Amoss Depo., Exh. 8, at 10-11.)

The January 2 Addendum thus seemed to allow Lykes to change the type of service on Trade Routes 17 and 29 by substituting containerships for the RO/RO and conventional ships at anytime during the twenty-year period without preserving the rights of interested parties to be given

---

[3] Essentially all cargo ships are capable of carrying a limited number of containers, usually lashed to the deck. The term "containership" used in this case—as in the shipping trade—referred to ships fully dedicated and specially constructed or modified to carry containers. (I SER 141, Kozlowski Depo. 10.)

notice and an opportunity to be heard if Lykes chose to substitute containerships. Petitioner *itself* read the January 2 Addendum that way. It alleged in its second amended complaint that the Addendum left Lykes free to employ containerships under the subsidized operating authority Lykes had acquired from States. (I SER 55, ¶ 13.)

3. *Respondents' Petitions.* On January 12, 1979, APL filed a petition for reconsideration of the January 2 Addendum. (I ER 127, App. J at 16.) APL pointed out that the "understanding" described in the January 2 Addendum ran afoul of *Connor* by leaving Lykes free over a twenty-year period to change the type of service that States had provided on the two Pacific Trade Routes (and the limited service Lykes had provided on Trade Route 17) by substituting containerships for the RO/RO and conventional vessels used by States and Lykes, without giving interested parties prior notice and opportunity to be heard as required by Section 605(c). (*Id.* at 7.) APL's petition, therefore, requested that MARAD advise Lykes either (1) that the "understanding" as it then stood was rescinded as unlawful or (2) that the "understanding" would be implemented only after Section 605(c) procedures were followed and Lykes had accepted the same subsidy and other funding terms required of other subsidized operators. (*Id.* at 16-17.) U.S. Lines filed a petition similar to APL's on January 15, 1979 (I ER 151, Exh. 43), and Sea-Land informed MARAD and interested parties that it reserved the right to file a petition unless the relief sought by APL and U.S. Lines was granted. (I ER 151, Exh. 54.)

4. *Lykes' Agreement That 605(c) Notice Be Given.* Lykes' counsel was Washington, D.C. attorney Odell Kominers, who had represented Lykes in maritime matters

for years. (I SER 157, Kominers Depo. 3, 12, 143-44.) Kominers advised Lykes' president and chief executive, James Amoss, that MARAD's Subsidy Board had consistently taken the position that, as argued in the petitions, a hearing was "absolutely" necessary under the facts of this situation. (I SER 157, Kominers Depo. 159-60; II SER 374, Amoss Depo. 182-83, 335.) Amoss then spoke with APL's president, Bruce Seaton, and its executive vice president, Henry Kozlowski,[4] and agreed, subject to MARAD approval, to modify the January 2 Addendum to provide for notice and opportunity for hearing if, in the future, Lykes decided to put full containerships into the States service. (II SER 374, Amoss Depo. 199-204.)

After review and revision by counsel for APL and Lykes, and then by counsel for Sea-Land and U.S. Lines—the other parties entitled to notice—the proposed amendment was submitted to MARAD for its approval. The proposed amendment provided in pertinent part that "Lykes shall not enter containerships into service on Trade Route 29 or Trade Route 17 (Pacific), whether directly or as top-offs, nor be required to replace existing vessels with containerships for such service, without prior notice and opportunity for hearing under Section 605(c) of the Act." (II SER 374, Amoss Depo., Exh. 14.) APL

---

[4] Petitioner's assertion that APL's "Kozlowski asked [Lykes'] Amoss to agree to not operate [*i.e.*, acquire] containerships" is absolutely false and shown to be false by the very testimony which petitioner cites. (Pet. 5.) That testimony establishes that the only restriction discussed was the one to which respondents were entitled by law—*i.e.*, that Lykes not introduce containerships into service without prior notice and opportunity for hearing under Section 605(c). (I SER 141, Kozlowski Depo. 177-80, 183-84.)

and U.S. Lines withdrew their petitions contingent upon the adoption by MARAD of the amendment. (II SER 374, Amoss Depo., Exhs. 14 and 17.)

5. *MARAD's Adoption of the Proposed Amendment.* MARAD's General Counsel at the time of the activity in question here testified that respondents were entitled to Section 605(c) notice and hearing before Lykes could introduce containerships into its Pacific service. (I SER 299, Exh. 2, Caras Depo. 50, 79-81.) Indeed, he had so informed Lykes' counsel after the January 2 Addendum had been issued. Acting in accordance with the opinion of its General Counsel that notice and opportunity for hearing were legally required, MARAD approved the proposed amendment. (I SER 299, Exh. 2, Caras Depo. 81; II SER 374, Amoss Depo., Exh. 24.)

6. *Lykes Was Not a Potential Bidder for the PFEL Ships.* In order to prevail on its petitioning claim, petitioner necessarily had to show that Lykes would have bid on the PFEL ships but for the MARAD activity. Recognizing this, petitioner claims that containerships were "the only vessels suitable for operation in [the Pacific Coast—Far East] trade." (Pet. 2.) Petitioner cites no evidence to support that claim. In any event, the view of anyone other than Lykes is irrelevant, and the record showed, without contradiction, that that is not how Lykes saw things.

More specifically, the record showed that Lykes' Amoss felt Lykes did not have the marketing ability, experience, or facilities to undertake a large containership operation, and he wanted to develop Lykes' West Coast business gradually, seeking only a toehold. (II SER 374,

Amoss Depo. 118-20, 312-13.) Moreover, Lykes not only lacked interest in the containerships, but lacked the money to buy them as well. In 1978, Lykes had been purchased by LTV Corporation. (I SER 157, Kominers Depo. 174-75.) LTV imposed strict financial controls on Lykes that prevented Lykes from making any substantial new financial commitment. (II SER 374, Amoss Depo. 140-42; I SER 157, Kominers Depo. 174-75.) Consequently, Lykes' president (Amoss), its senior vice president (Blocklin) and its counsel (Kominers, who was also a member of the Lykes management team) all testified that Lykes was not interested in acquiring the PFEL containerships, or any other containerships, at or before the time the PFEL ships were sold. (I ER 129, Amoss Decl. ¶¶ 2-3; I SER 157, Kominers Depo. 166-67, 174-75; III ER 389, App. N, Blocklin Depo. 110-11.)[5]

---

[5] Petitioner implies that Lykes' vice president, Hans Blocklin, testified that, but for the Section 605(c) restriction, Lykes would probably have wanted to acquire containerships for use in the Pacific, possibly during 1979. (Pet. 7.) In fact, that is what Assigned's counsel wanted Blocklin to say, but Blocklin stated the opposite:

> Q. At the time that you agreed to Article 3 on January 29, 1979, and you read Article 3, it was your understanding that Lykes, because of that Article, would not be acquiring containerships absent notice and hearing?
>
> * * *
>
> THE WITNESS: One comes before the other. I don't think —you're making it, it seems to me—the way you pose the question, you're making it seem to me that the reason we're not going to obtain any containerships is because of that agreement.
>
> MR. APPEL: That's part of it.
>
> THE WITNESS: And that's not correct.
>
> MR. APPEL: That is not true?

(Continued on following page)

Notwithstanding this testimony from Lykes, petitioner claim that "in August, 1978, Lykes began to consider private purchase of one or more of the PFEL containerships then for sale." (Pet. 3.) To support this claim, petitioner cites the declaration of PFEL's then bankruptcy trustee, Benedict, which petitioner says shows that Lykes' Amoss "told the trustee that Lykes could potentially be interested in acquiring containerships in the future." (Pet. 3.) This turns the Benedict declaration inside out. Benedict stated that in August 1978, before the petitions were filed, he contacted Amoss in an effort to sell Lykes the PFEL ships; Amoss told him that "Lykes had neither the financial nor organizational resources to consider acquiring these vessels at that time." (I SER 307, Benedict Decl. 7.) Amoss told Benedict the same thing on January 22, 1979, after the petitions had been filed, when Benedict tried again to interest Amoss in the PFEL ships. Benedict was again told that Lykes had no interest because "Lykes still felt as [Amoss] had told [Benedict] previously that they were not ready to undertake a full blown container operation." (I SER 307, Benedict Decl. 10.)

———o———

(Continued from previous page)

THE WITNESS: No. We were not interested in containerships. That's why that agreement wasn't that—it wasn't burdensome at the time.

By MR. APPEL: As of January 29, 1979?

A. Yes. Or '80, or '81 or '82.

(III ER 389, App. N, Blocklin Depo. 110-111.)

REASONS FOR DENYING THE WRIT

Petitioner fails to show any "special and important reasons" to grant the writ. (Rule 17.1.) Nowhere does the petition demonstrate that any legal standard employed by the decision conflicts with any standard employed by other circuit courts or this Court. Nor does the petitioner describe any important question of federal law which has not been, but should be, settled by the Court. Indeed, the petition does not identify any way in which the opinion below will affect federal jurisprudence in any respect at all.

In addition, the Court of Appeals was correct in its conclusion that petitioner failed to present substantial evidence to take the petitioning process out of the *Noerr-Pennington* doctrine. Although the Court of Appeals did not reach the question whether the judgment below was also supported by the uncontroverted evidence establishing lack of causation, that evidence provided an independent and additional ground for affirming the judgment.

———o———

ARGUMENT

I. THE COURT OF APPEALS' APPLICATION OF THE NOERR-PENNINGTON DOCTRINE DID NOT CONFLICT WITH SOCONY-VACUUM

Petitioner claims that the Court of Appeals violated this Court's decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) ("*Socony-Vacuum*") by apply-

ing the *Noerr-Pennington* doctrine to a "private agreement among respondents and Lykes" arising from negotiations that occurred "prior to the filing of any petition." (Pet. 8-9.) The decision below did no such thing.

To begin with, there was no evidence at all of a "private agreement" originating prior to the petitions. Petitioner refers to testimony of Lykes' Amoss about contacts Amoss had with executives of APL, U.S. Lines and Sea-Land in December 1978, before any petitions were filed, but petitioner does not mention what was discussed among these individuals in December 1978. (Pet. 8.) Elsewhere, however, petitioner admits that "Amoss testified that containerships and/or containers hadn't so much as been mentioned during his December 1978 conferences with Seaton, Bru and Sea-Land." (Pet. 5.) That testimony stood uncontradicted.

As the Court of Appeals stated, the only agreement in the record between Lykes and the respondents was part of the "petitioning process." (Pet. A-9.) That agreement was a response to petitions "simply asking MARAD and Lykes to comply with the law." (Pet. A-10.) And the agreement simply provided that "subject to MARAD approval," the January 2 Addendum would be modified "to provide for notice and a hearing if, in the future, Lykes decided to put full containerships into service on State's Pacific trade routes." (Pet. A-9.)

As a matter of law, any amendment to the January 2 Addendum agreed upon by Lykes and the respondents had to be approved by MARAD, as a party to the Addendum (and the agency responsible for determining the terms of any subsidy), before the amendment could be-

come effective. Thus, as petitioner's second amended complaint admitted, the restriction which allegedly kept Lykes from bidding was not simply contained in a "private agreement"; it was adopted by MARAD in its agreement with Lykes. (I SER 55, ¶ 19; II SER 374, Amoss Depo., Exh. 24.)[6]

The Court of Appeals' application of the *Noerr-Pennington* doctrine on that record did not conflict with *Socony-Vacuum* in any respect. *Socony-Vacuum* (which was decided two decades before the *Noerr-Pennington* doctrine was born) concerned a naked price-fixing agreement for which no government approval was ever sought or formally granted. (310 U.S. at 226.) There is nothing in the Court's opinion to suggest that the *Noerr-Pennington* doctrine does not apply where, as here, (1) petitioners simply asked MARAD and Lykes (as the Court of Appeals said) "to comply with the law" (Pet. A-10); (2) Lykes agreed "subject to MARAD approval" to modify its agreement with MARAD to do so (Pet. A-9); and (3) MARAD approved the modification. That petitioning process was in the heartland of the *Noerr-Pennington* doctrine.

II. THE COURT OF APPEALS' APPLICATION OF THE NOERR-PENNINGTON DOCTRINE DID NOT CONFLICT WITH CARNATION

Petitioner also argues that there was no antitrust immunity because the Federal Maritime Commission (FMC)

---

[6] Petitioner's assertion that "it is admitted by defendants that MARAD was acting as a 'passive pawn to private negotiations'" (Pet. 9) turns a letter written by APL's counsel inside-out. That letter said in substance that MARAD was not a "passive pawn to private negotiations" but was instead "a government agency taking whatever action it considers to be right."

is the only regulatory agency which has any power to exempt or immunize conduct engaged in by ocean shippers from the federal antitrust laws; the Shipping Act of 1916 (46 U.S.C. §§ 801 *et seq.*) specifies the procedure required to obtain that antitrust immunity; and respondents did not follow that procedure. All of this is said to flow from the Supreme Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966) (*"Carnation"*).

The FMC and the Shipping Act had nothing to do with this case. The restrictions which petitioner says kept Lykes from bidding resulted from petitions filed with MARAD, not the FMC; and the Shipping Act has nothing to do with MARAD subsidy matters. The antitrust immunity which respondents claim does not rest on the Shipping Act or any other statute. It rests on the *Noerr-Pennington* doctrine, which is based on the First Amendment.

Carnation is likewise irrelevant to this case. As petitioner admitted in the district court, the defendants in *Carnation* did not petition the FMC, or any other governmental agency, so that *Noerr-Pennington* immunity was not involved in that case. (Petitioner's 7/22/82 Memo, at 14-15, 18.) There is nothing in *Carnation* to suggest that *Noerr-Pennington* immunity, which rests on the First Amendment, is not available because a statutory immunity is not also available. Nor is there anything anywhere else in the law to support that absurd proposition.

III. THERE WAS AN ALTERNATIVE GROUND FOR AFFIRMING THE JUDGMENT BELOW

This Court has expressly held that an antitrust plaintiff must establish, as an essential element of its case,

that the alleged antitrust violation in fact caused it injury. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

As discussed above (pp. 9-11), the uncontradicted testimony in this case was that Lykes was not interested in acquiring the PFEL containerships because of limitations on its fiscal and organizational resources. That is what Lykes' executives said. That is what petitioner's assignor said. That uncontroverted testimony furnished another, independent reason why the judgment below was correct and had to be affirmed.

———o———

CONCLUSION

The Petition does not present any of the "special and important reasons" required for the granting of review on writ of certiorari under Rule 17.1 and therefore should be denied.

Respectfully submitted,

Lasky, Haas, Cohler & Munter P.C.
Charles B. Cohler
Terry M. Gordon
505 Sansome Street
San Francisco, CA 94111
(415) 788-2700

Robert S. Zuckerman*
Sea-Land Service, Inc.
P. O. Box 800
Iselin, New Jersey 08830
(201) 632-2222

Counsel for Respondent Sea-Land Service, Inc.

Donovan Leisure Newton & Irvine
Sanford M. Litvack*
Vivian Polak
303 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Carr & Mussman
Timothy E. Carr
Lenell Topol
Three Embacardero Center
San Francisco, CA 94111
(415) 391-7112

Counsel for Respondent United States Lines, Inc.

McCutcheon, Doyle, Brown & Enersen
J. Thomas Rosch
John N. Hauser*
Brenda G. Woodson
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Counsel for Respondent American President Lines, Ltd.

*Counsel of Record

September 29, 1986